No. 80-1282

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT ANTHONY PODESTA, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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Petitioner claims that the court of appeals erred in holding that there was substantial evidence in the record to support the Securities and Exchange Commission's finding that he willfully violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and the Commission's Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5.

1. Following an administrative hearing at which petitioner was represented by counsel, an administrative law judge for the Commission found that petitioner had orchestrated options transactions having no bona fide purpose on the floor of the Chicago Board Options Exchange ("CBOE") and caused the public dissemination of those transactions in violation of the antifraud provisions of

the Securities Exchange Act of 1934. After independently reviewing the record and applying a "clear and convincing evidence" standard of proof,[1] the Commission reached the same conclusions and imposed a 30-day suspension (Pet. App. 1b-10b). The findings of the administrative law judge and the Commission were based, in part, upon sworn statements by Ronald R. Michno, a witness at the Commission's hearing, given in prior investigations conducted by the Commission and the CBOE.

On petition for review of the Commission's order, brought under Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a), the court of appeals noted that the sole question before it was whether there was substantial evidence in the record to support the Commission's finding of a knowing violation. The court of appeals found that "the record contains substantial support for the result reached by the Commission" (Pet. App. 2a). Petitioner asks this Court to re-examine that determination.

2. Petitioner has never argued that any evidence was improperly admitted into the record at the Commission's hearing (Pet. 5 n.3). Indeed, at the hearing, petitioner consented to the introduction of the prior investigation statements given by Michno (Pet. 5; Pet. App. 5b n.8). Petitioner merely objects to the weight accorded to Michno's prior

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[1]Both the administrative law judge in his initial decision and the Commission in its review applied the "clear and convincing evidence" standard of proof as opposed to the "preponderance of the evidence" standard. The court of appeals noted that there was no issue before it as to whether clear and convincing proof of a violation was necessary (Pet. App. 2a). Subsequent to the court of appeals' decision, this Court held that this extraordinary burden of proof is not required in Commission disciplinary proceedings. *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981).

testimony (Pet. 7).[2] But such evidence, admitted with petitioner's consent, may properly be considered and accorded its natural probative effect. See *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941). Thus, review by this Court would only involve reappraisal of the adequacy of the evidence, a task already performed by the court of appeals. Under these circumstances, further review is not warranted. See *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503 (1951); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[3]

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[2]In Mincho's direct examination at the administrative hearing, counsel for the Commission's Division of Enforcement established that Mincho's current recollection of the contrived transactions was limited and that his prior testimony did not serve to refresh his recollection (App. 57-58). Mincho testified that he recalled that he did in fact give prior testimony to the CBOE and the Commission, that it was given truthfully and honestly, under oath, before a court reporter, with his counsel present, and that he had been advised of the CBOE's penalties for giving false statements and of the perjury statutes (App. 58-62, 71). ("App." refers to the joint appendix in the court of appeals.)

[3]In any event, the court of appeals correctly concluded that the Commission's findings were supported by substantial evidence. See Pet. App. 1b-9b. Contrary to petitioner's contention (Pet. 5), the evidence demonstrates that Mincho's previously recorded testimony was not self-contradictory, ambiguous or uncorroborated in any material respect (see App. 168-227). Rather, Michno's testimony, when examined in light of the other testimony and documentary evidence at the hearing, shows that petitioner carried out options transactions that had no bona fide economic purpose and thereby "knowingly caused the dissemination of materially misleading information to the public with respect to the state of the market for such options" (Pet. App. 2a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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